STATE OF MICHIGAN

COURT OF APPEALS

MARCELLI CONSTRUCTION COMPANY, INC, a Michigan corporation, TONY MARCELLI, and CYNTHIA MARCELLI,

Plaintiffs-Appellants,

v

OHIO FARMERS INSURANCE COMPANY, an Ohio corporation,

Defendant-Appellee.

UNPUBLISHED
June 23, 2005

No. 254230
Oakland Circuit Court
LC No. 03-051080-CZ

Before: Sawyer, P.J., and Markey and Murray, JJ.

PER CURIAM.

Petitioners appeal by right the trial court's order denying their petition to set aside a prior judgment and granting respondent's motion for summary disposition based of the doctrine of res judicata. We affirm.

In 1998, petitioners, Marcelli Construction Company, Inc., and its owners, Tony and Cynthia Marcelli, were found liable for $6,648,552 to respondent, Ohio Farms' Insurance Company, which had issued payment and performance bonds for ten of petitioners' construction projects. The trial court held that the petition to set aside the previous judgment was barred by res judicata.

Petitioners assert that the doctrine of res judicata does not apply to a request for relief pursuant to MCR 2.612 because a necessary requirement for such relief is the existence of a prior judgment. The applicability of res judicata is a question of law, which is reviewed de novo on appeal. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004); *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 510; 679 NW2d 106 (2004). The answer to this appeal turns on the relationship between res judicata and MCR 2.612.

The purpose of the doctrine of res judicata is to prevent multiple suits litigating the same cause of action. *Adair, supra* at 121. "The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Id.*

MCR 2.612(C) provides grounds from which parties can seek relief from a judgment, including, but not limited to, newly discovered evidence (b), fraud or misrepresentation (c), or any other reason justifying relief (f). MCR 2.612(C)(3), under which petitioners sought relief, provides:

> This subrule [MCR 2.612(C)] does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding; to grant relief to a defendant not actually personally notified as provided in subrule (B); or to set aside a judgment for fraud on the court.

Petitioners cite several cases in support of their argument that the court rule "establishes an exception to the doctrine of res judicata, allowing a party to seek to overturn a judgment, regardless of the fact that the judgment is final and is beyond any appellate review." We agree that the court rule identifies some of the instances wherein the doctrine of res judicata would not apply. See, e.g., *Colestock v Colestock*, 135 Mich App 393, 397-398; 354 NW2d 354 (1984). As the *Colestock* Court noted, the provisions of MCR 2.612 can operate to relieve a party from a judgment that otherwise would have res judicata effect. *Id.* Therefore, the trial court did not err as a matter of law by applying res judicata to a petition simply because it was brought under MCR 2.612(C). Instead, the question is whether res judicata bars this second action and, if so, whether petitioner can nonetheless proceed under MCR 2.612(C)(3).

We conclude, as did the trial court, that res judicata bars the instant action. The same parties are involved in this case as in the prior one, and as Judge Howard's November 10, 1998 opinion makes clear, petitioner argued in the prior case that respondent was "suing the project owners for their breaches of the underlying construction contracts with [petitioner]." The evidence which petitioner now claims to be "new evidence" of fraud is merely evidence supporting the assertion it had raised to the trial court in the prior action, and which was rejected by that court. The prior action was also resolved on the merits, and therefore res judicata bars this action. *Adair*, *supra* at 121.

Petitioners assert that they are nonetheless entitled to relief from the prior judgment pursuant to MCR 2.612(C)(3). We disagree. A trial court's decision to grant or deny a motion to set aside a prior judgment is reviewed for an abuse of discretion. *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999). Such an abuse occurs "'when the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias."'" *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999) (citations omitted).

This Court has determined that, "to be entitled to relief from a judgment in an independent equitable action," a party must establish the following five elements:

> (1) the judgment is one that ought not, in equity and good conscience, be enforced, (2) there is a valid defense to the alleged cause of action on which the judgment is founded, (3) fraud, accident, or mistake prevented the defendant from obtaining the benefit of the defense, (4) there was no negligence or fault on the part of the defendant, and (5) there is no adequate remedy available at law. [*Trost*

v Buckstop Lure Co, Inc, 249 Mich App 580, 589; 644 NW2d 54 (2002) (citations omitted).]

The trial court did not abuse its discretion in concluding that petitioners had not established that the prior judgment was one that ought not, in equity and good conscience, be enforced. *Trost, supra*. All of the arguments now posited by petitioner were addressed in the prior action, including in appeals through our Supreme Court. Reassertion of these same grounds at a later date does not require setting aside the prior judgment.

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Christopher M. Murray